THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROUNDY'S, INC.,

Respondent,

and Case 30-CA-17185

MILWAUKEE BUILDING AND
CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Charging Party.

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE*

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INTRODUCTION

The Board has consistently held that an employer violates § 8(a)(1) of the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. § 158(a)(1), when it denies nonemployee union representatives "access to its property while permitting other individuals, groups, and organizations to use its premises for various purposes." *Sandusky Mall Co.*, 329 NLRB 618, 620 (1999). In *Sandusky Mall*, the employer excluded, and caused the arrest of, two union employees who were engaged in § 7-protected area standards handbilling in its mall, while it continued to allow solicitation by others. The *Sandusky Mall* holding is consistent with the Board's longstanding interpretation of § 8(a)(1), which the Supreme Court acknowledged more than 50 years ago when it noted that an employer violates § 8(a)(1) by barring nonemployee union representatives from distributing literature or soliciting on its property if its "notice or order … discriminates against the union by allowing other distribution." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

However, the use of the term "discrimination" by the Board and the courts with respect to § 8(a)(1) violations has created some confusion about the Board's "decisional rules" in this area. *See, e.g., Sandusky Mall*, 329 NLRB at 625 (Member Brame, dissenting).

The Board should take this opportunity to clarify the meaning of "discrimination" in its analysis of § 8(a)(1) claims, and to distinguish the substantive right to engage in protected activity afforded by § 7 from the protections against unequal treatment found in other statutes. The insights of the *Register-Guard* dissent as to the meaning of "discrimination" under § 8(a)(1) should illuminate the Board's application of that concept in nonemployee access cases as well.

Section 8(a)(1) is not an antidiscrimination statute; it does not require equal treatment for union activities and other activities. Rather, by its terms it grants *affirmative* protection for § 7

activities. The harm in employer "discrimination" against § 7 activity occurs when an employer permits some outside solicitation or distribution on its property, thus demonstrating that access by outside groups is not inconsistent with its use of its property, but denies access for nonemployee union representatives to engage in similar conduct that is protected by § 7. Importantly, the prohibited union activity and the permitted non-union activity need only be "similar" in terms of the *conduct* at issue in order for a § 8(a)(1) violation to occur. The Board should clarify that, given the affirmative protection the Act grants to § 7 expression, employers cannot lawfully bar protected activity by nonemployee union representatives, while permitting similar conduct by other outsiders, on the basis of rules which distinguish on the basis of the speaker's *identity* or the *content* of the expression, even if those rules do not explicitly single out § 7 speech for exclusion.

INTEREST OF AMICUS CURIAE

Service Employees International Union ("SEIU") is one of the largest unions in North America, representing 2.2 million men and women who work in health care, property services, and public employment. SEIU also focuses heavily on organizing workers who are not yet represented by a union. Robust protection for § 7 activity by union representatives is crucial to SEIU's ability to effectively protect the rights of the workers it already represents and to give unorganized workers the opportunity to unionize.

ARGUMENT

I. Access to Employer Property by Nonemployee Union Representatives Strongly Implicates Employees' § 7 Rights

The NLRA, unlike many other labor, civil rights, and employment laws, does more than ensure a level playing field by protecting individuals from discrimination. Rather, the Act grants substantive rights to employees, including "the right to self-organization, to form, join, or assist

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection …" NLRA § 7, 29 U.S.C. § 157. Section 8(a)(1) of the Act goes on to provide that it is unlawful to "interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1). Because of this protection, employees' exercise of the rights guaranteed by § 7 is referred to as "protected activity."

The right to engage in protected activity is not limited to situations involving an employer and its own employees. Rather, the § 7 right to engage in "mutual aid or protection" also applies to many activities by nonemployee union representatives. For many of these activities, union access to employer property is vitally important.

Perhaps most prominently, access to employer property by nonemployee union representatives for the purposes of union organizing strongly implicates the § 7 rights of that employer's employees to form a union.[1] *See Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583 (D.C. Cir. 1996) (employer violated § 8(a)(1) by barring union organizer while permitting solicitation by others). The Supreme Court acknowledged as much in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) when it noted that "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."

[1] Union organizing efforts also implicate the § 7 rights of employees who are already represented by unions, because attempts to organize the unorganized lead to "strength in numbers" and increase the ability of already-unionized workers to "improve their own working conditions." *Hillhaven Highland House,* 336 NLRB 646 (2001), *enforced sub nom First Healthcare Corp. v. NLRB,* 344 F.3d 523 (6th 2003). *See also Meijer, Inc.*, 329 NLRB 730, 734 (1999) ("[T]here is abundant evidence that, in collective bargaining, unions are able to obtain higher wages for the employees they represent . . . when the employees of employers in the same competitive market are unionized."), *enforced*, 307 F.3d 760 (9th Cir. 2002) (*en banc*).

In point of fact, it is very difficult for most workers to form unions without the assistance of union representatives. Union organizing is "in part a concerted attempt to persuade a majority of employees in a bargaining unit that … the benefits will outweigh the risks of supporting the union." Cynthia Estlund, *Labor, Property, and Sovereignty after Lechmere*, 46 Stan. L. Rev. 305, 331 (Jan. 1994). Organizing, therefore, requires that union organizers be able to speak in person to unorganized employees, in order to have the sort of "uninhibited, robust, and wide-open debate" that the Act encourages and protects. *Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60, 68 (2008).

And it is vital that union organizers have access *to the workplace* in order to effectively communicate with employees about the benefits of forming a union. The workplace is "uniquely appropriate" for organizing activity. *Register-Guard*, 351 NLRB 1110, 1123 (2007) (dissenting opinion) (citing *NLRB v. Magnavox Co*., 415 U.S. 322 (1974)). Indeed, the workplace can be the *only* practical place for union organizers to locate and speak to unorganized workers about forming a union. In many cases, the union may have no other way of being able to locate employees at home or at other non-work locations. This is even more true today than it was when the Act was passed. In an earlier era, retail stores and even factories were often located on streets with public sidewalks where nonemployee union representatives could stand to speak to employees and customers as they passed by on foot. Today, our landscape is dominated by suburban shopping malls and strip malls. Union representatives must either enter private property in order to speak to employees and customers, or resort to standing in the limited public areas outside a parking lot, trying to communicate with people speeding by in their cars.

Reviewing courts have often failed to understand that union access to a nonunion employer's property to publicize the employer's labor practices is equally vital to the effective

exercise of § 7 rights. The Act itself explicitly protects such publicity when it is done "for the purpose of truthfully advising the public (including customers) that an employer does not employ members of, or have a contract with, a labor organization." NLRA § 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C). A union's handbilling or solicitation of the public to publicize a non-union employer's unfair labor practices is also protected, *Wild Oats Markets, Inc.*, 336 NLRB 179, 179 n.4 & 181 n.8 (2001), as is its publicizing that an employer is undercutting area wage and benefit standards. *O'Neil's Mkts. v. UFCW Local 88*, 95 F.3d 733, 737 (8th Cir. 1996) ("[I]n engaging in area standards picketing, a union is 'protecting the wage standards of its members who are employed by competitors of the picketed employer.'") (quoting *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978)). Congress recognized that employers who do not respect the rights of workers to organize and bargain collectively improperly depress wage rates. NLRA § 1, 29 U.S.C. § 151. Unions must be able to effectively publicize these practices in order to accomplish the purposes of the Act.

These rights are no less protected when the union's message includes a request to customers not to patronize the employer. *Sandusky Mall Co.*, 329 NLRB 618, 618 & 620 (1999); *Great-Scot Inc.,* 309 NLRB 548 (1992), *vacated on other grounds,* 39 F.3d 678 (6th Cir.1994); *Wild Oats Markets*, 336 NLRB at 179 n. 4 & 181 n.8. As exemplified by § 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C), Congress recognized that these types of appeals to the public are "crucial to employees' ability to exercise power within the employment relationship." Estlund, *supra*, at 351.

And since a union's goal in publicizing a labor dispute is to communicate to a *particular* business's customers about *that* business's practices, access to *that* business's property is vital to ensuring that the message is actually communicated to the intended audience. *See Southern Sun*,

237 NLRB 829, 830 (1978) (employer's attempt to confine union's publicizing of labor dispute with subcontractor to reserved gates not visible from the road or other public areas "would unjustly impair the effectiveness of [the union's] lawful picketing to convey its message to [the employer's] personnel, suppliers, visitors, and the general public.")

II. An Employer May Have a Property Interest Sufficient to Exclude *All* Outside Solicitation and Distribution on its Property, But It May Not Discriminate by Excluding Union Solicitation and Distribution While Permitting Others to Engage in Similar Conduct

Whether an employer has a property interest sufficient to exclude all nonemployees from its property, including nonemployee union representatives who wish to engage in protected § 7 activity, initially involves a consideration of the employer's state law property rights.[2] On several occasions the Supreme Court has addressed how those property rights and §7 should be "accommodated." *Babcock & Wilcox*, 351 U.S. at 112. In so doing, it has held that where an employer does not uniformly enforce a non-solicitation policy, but rather "discriminate[s] against the union by allowing other distribution," *id.*, the employer has violated § 8(a)(1).[3]

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[2] Neither the NLRA nor any other federal law or constitutional provision gives employers a right to exclude nonemployee union representatives from their property. *See Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 84 (1980). If an employer has such a right, it derives from state law. This being so, where an employer has no property right to exclude outsiders, it violates § 8(a)(1) if it bars nonemployee union representatives from engaging in § 7 activities on its property. *Food for Less*, 318 NLRB 646, 649 (1995), *enforced in relevant part*, 95 F.3d 733 (8th Cir. 1996). *See also Fashion Valley Shopping Center*, 343 NLRB 438 (2004), *enforced*, 524 F.3d 1378 (D.C. Cir. 2008) (California shopping center violated § 8(a)(1) where it enforced rule barring consumer boycott handbilling against union handbillers, in light of state constitutional right to speak and petition in private shopping centers).

Likewise, in the case at hand, as the Board found, Roundy's lease agreements did not give it an exclusionary property interest at 23 of the 26 store locations in question. *Roundy's Inc.*, 356 NLRB No. 27 (2010). Roundy's thus violated § 8(a)(1) when it prohibited nonemployee union representatives from handbilling in front of those stores.

[3] As the agency entrusted by Congress to interpret the NLRA, the Board's interpretation of what types of discrimination unlawfully interfere with the exercise of § 7-protected rights is entitled to deference by the courts. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996). While "labor law

The Supreme Court first grappled with how to accommodate the § 7 interest in union access with employer property rights in *NLRB v. Stowe Spinning*, 336 U.S. 226 (1948). There, a union organizer was attempting to organize mill employees in a company town. The employers denied the organizer permission to use the only meeting hall available in the town. The meeting hall had been built for use by the Patriot Order Sons of America, and had also been used by other non-employer groups, including "church banquets, Ladies Aid Society meetings, a Christmas party for school children, and … a safety school for employees of the respondents." *NLRB v. Stowe Spinning*, 165 F.2d 609, 610 (4th Cir. 1947).

The Supreme Court affirmed the Board's conclusion that the employer's property rights did not give it the right to discriminate against the union. Although the employer retained ownership over the meeting hall, the "refusal [of the hall] … was unreasonable because the hall had been given freely to others, and because no other halls were available for organization." 336 U.S. at 233.

Eight years later, the Supreme Court again addressed union access in *Babcock & Wilcox*, 351 U.S. 105 (1956). No discrimination was present in that case. Rather, the question before the Court was whether a factory owner that uniformly prohibited all distribution on its property

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is only one of many bodies of federal doctrine implementing an antidiscrimination principle," *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995), "[t]he Board is entitled to, and often does, adopt rules that differ from those in other parts of the law." *Id.* at 320. The Board may also adopt an interpretation of the Act which differs from, or is even inconsistent with, a prior judicial construction of the Act. *Nat'l Cable & Telecommunications Assn v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005). As the *Brand X* Court explained, "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id.* Such a "gap" is particularly evident here, where the Board is attempting to discern the meaning of a discrimination principle in the enforcement of a statutory right which makes no reference to "discrimination." *Cf. Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (stating, in discussion of the "unavailability" rule for nonemployee access to private property, that *Babcock & Wilcox* was a determination of the Act's "clear meaning.")

could bar nonemployee union representatives from distributing literature in a company parking lot. The Court reasoned that where the rights guaranteed by the NLRA and the private property interests of an employer were in tension, "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id.* at 112. The Court then drew a distinction "of substance," *id.* at 113, between the rights of employees and those of nonemployee union representatives. Employees themselves have a greater right than do nonemployee union representatives to engage in § 7 activity at the workplace; they cannot be restricted in their discussions of self-organization "unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *Id.* (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945)). *See also Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976) (when activity is "carried on by employees already rightfully on the employer's property … the employer's management interests rather than his property interests" are involved.) In contrast, where the employer has a property right to exclude all outsiders, the employer can exclude nonemployee union representatives *if* the union could reach the employees through "reasonable efforts … through other available channels," and the employer "does not discriminate against the union by allowing other distribution." *Id.* at 112. These two conditions have come to be known as the "inaccessibility" and "discrimination" rules, respectively.

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Supreme Court significantly narrowed the "inaccessibility" rule. The Court held that an employer that uniformly enforces a no-handbilling, no-solicitation policy can only be required to permit nonemployee union representatives to solicit or handbill on its property in the unusual case that the employees, "by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society." *Id.* at 540. The court cited work locations such as mining camps and mountain

hotel resorts as examples of this type of "inaccessibility." *Id.* at 539. Except in those unusual cases, the Court held, the "accommodation" between § 7 rights and employer property rights required by *Babcock & Wilcox* has taken place because "nonemployee union organizers have reasonable access to employees outside an employer's property." *Id.* at 538.

While it significantly limited the inaccessibility rule, the *Lechmere* court did *not* alter the discrimination rule. No discrimination was present in *Lechmere*; the employer had uniformly enforced its no-solicitation policy, including against the Salvation Army and the Girl Scouts. 502 U.S. at 530 n. 1. The *Lechmere* court also approvingly cited *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978) for the proposition that "[t]o gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists *or that the employer's access rules discriminate against union solicitation*." *Id.* at 535 (emphasis omitted and emphasis added).

While the Court and the Board have long recognized that "discrimination" in access rules violates § 8(a)(1), the rationale for that rule has been left largely unexplored. *See, e.g., Cleveland Real Estate Partners*, 95 F.3d 457, 465 (1996) ("[T]he Court has never clarified the meaning of the term [discrimination], and we have found no published court of appeals case addressing the significance of 'discrimination' in this context"). Thus, we now turn to a discussion of the rationale which underlies the § 8(a)(1) discrimination rule, and the precise bounds of that rule.

III. The § 8(a)(1) "Discrimination" Rule Means an Employer Interferes with § 7 Rights When It Denies Access for § 7 Solicitation or Distribution While Permitting Similar Conduct by Others Under Policies that Draw Lines Based on the Identity of the Speaker or the Content of the Speech

The § 8(a)(1) discrimination rule serves the purpose of protecting § 7 rights from employer "interference," "restraint," and "coercion." In interpreting this rule, the Board's nonemployee access cases implicitly recognize that when an employer allows some outsiders onto its property to engage in solicitation or distribution, it has demonstrated that its property interests do not require the complete exclusion of outsiders, but rather are consistent with the presence of outside solicitation. Accommodating the employer property right to selectively exclude outsiders on the basis of their identity or the content of their speech, on the one hand, and the affirmative statutory right to engage in protected activity, on the other, requires that nonemployee union representatives be permitted to engage in § 7-protected solicitation or distribution when other outsiders are allowed to engage in similar conduct.

In recent years many courts and even the Board, unaware of or ignoring the reasons for the § 8(a)(1) discrimination rule, have borrowed definitions of "discrimination" from statutes like Title VII and the ADEA. In so doing, they have inappropriately narrowed the protection that Congress intended to give to the exercise of §7 rights.

The Board should clarify the § 8(a)(1) discrimination rule in the following manner: An employer violates § 8(a)(1) when it bars § 7-protected activity by nonemployee union representatives, while permitting similar conduct by other "outsiders," under policies that draw lines based on the identity of the speaker or the content of the speech. In so doing, the Board should also make clear that it is overruling the rule derived from dicta in *Hammary Mfg. Corp.*, 265 NLRB 57, n.4 (1982) that "an employer does not violate § 8(a)(1) by permitting a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule." Such a rule

would not require, or permit, any case-by-case balancing of interests; rather, it is a clear and uniform rule against discriminatory exclusion of protected activity by nonemployees, based on a careful accommodation of § 7 rights and employer property rights.

A. The Discrimination Rule Reflects an Accommodation Between the Privileged Status of § 7 Rights Under the NLRA, and the Employer's Weakened Property Interest in Exclusion Where it Permits Other Outsiders to Engage in Solicitation or Distribution on its Property

While state laws may give private property owners a right to deny access to their property, it is well-established that federal statutes can limit those property rights. For instance, the Civil Rights Act of 1964 limited the right of business owners to choose whom to admit to their businesses on the basis of race. The NLRA likewise limits employer property rights in certain circumstances. "It is not every interference with property rights that is within the Fifth Amendment … Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining." *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 802 n. 8 (1945) (quoting *LeTourneau Co.*, 54 NLRB 1253, 1259-60 (1944)).

As the Supreme Court put it in *Lechmere*, the property rights of employers and the § 7 rights of nonemployee union representatives to access employer property must be "accommodated"; the question is where the "locus" of that accommodation lies. 502 U.S. at 538. The *Lechmere* court made clear that where an employer uniformly enforces a nonsolicitation policy on its property and nonemployee union representatives have reasonable access to employees outside the workplace, "the requisite accommodation has taken place." *Id.* The question at issue in discriminatory denial of access cases, which was not addressed in *Lechmere*, is where the "locus" of that "accommodation" lies when the employer does *not* uniformly enforce a no-solicitation policy, but rather bars § 7 protected activity by nonemployee union representatives while permitting similar activity by other outsiders.

When an employer has a right to exclude all outsiders from its property, but instead permits some outsiders to solicit or distribute literature, it has acknowledged that its use of its property is not inconsistent with the presence and activity of outsiders. To defend exclusion of a nonemployee union representative engaging in § 7-protected activity, the employer is left to assert a right to pick and choose which outsiders it prefers on its property on the basis of the content of their speech or the identity of the speakers – an interest that is significantly weaker than the right to exclude all outsiders. *See, e.g., Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 83 (1980) (finding that California's requirement that shopping center owners must allow free speech activity would not "unreasonably impair the value or use of their property as a shopping center"). As the Supreme Court noted *Marsh v. Alabama*, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the *statutory* and constitutional rights of those who use it." 326 U.S. 501, 506 (1946) (emphasis added). *See also Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 259 (1964) ("Appellant had no right to select its guests as it sees fit, free from governmental regulation.")

When an employer's asserted basis for excluding nonemployee union representatives engaging in § 7 activity is its interest in barring only certain outsiders on the basis of the identity of the speakers or the content of their speech, "accommodation" between that property right and the § 7 interest in nonemployee access to employer property requires that the § 7 activity be permitted. This is because the Act does not simply guarantee that § 7 activity be treated *the same* as other types of expression, in the fashion of an antidiscrimination law like Title VII or the

ADEA. *Register-Guard*, 351 NLRB at 1129 (dissenting opinion).[4] Rather, the Act grants an "*affirmative* right to engage in concerted *group* action for mutual benefit and protection." *Id.* (emphases in original). To honor an employer's content-based preference for certain types of solicitation or distribution to the detriment of § 7 activity would "eviscerate section 8(a)(1)'s purpose." *Lucile Salter Packard*, 97 F.3d 583, 591 (D.C. Cir. 1996).

This distinction – that § 8(a)(1) does not guarantee equal treatment along § 7 lines, but rather constitutes a special protection for affirmative statutory rights – explains why employers should not be permitted to selectively exclude § 7 activity by nonemployees, even when they do so on the basis of rules that are formally "neutral" with respect to § 7, and even when there is no evidence that they are acting out of anti-union animus. Under nondiscrimination statutes such as Title VII, unequal treatment on the basis of race, sex, or other protected characteristics is precisely the harm that the statute seeks to prevent. By contrast, whether the rights guaranteed

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[4] *Register-Guard* is relevant to this case inasmuch as the dissenting opinion in that case sets forth a well-reasoned approach to the meaning of "discrimination" under § 8(a)(1) which should inform the Board both in the instant case and in reconsidering *Register-Guard* itself at the appropriate time.

Register-Guard differs significantly from the instant case in that it involved § 7 activity by employees, not nonemployees. "Discrimination" arises at different points in the § 8(a)(1) analysis in employee and nonemployee cases. Where an employer has an exclusionary property right and the employees are not "inaccessible," nonemployee union representatives must show discrimination as a threshold in order to establish their right to access employer property. By contrast, as the *Register-Guard* dissent explained, employees have a threshold right to engage in § 7 activity, and employers cannot interfere with that right unless they show a "business justification that outweighs the infringement." 351 NLRB at 1129. "Discrimination, when it is present, is relevant simply because it weakens or exposes as pretextual the employer's business justification." *Id.*

That being said, in either employee or nonemployee cases, once the question of whether discrimination has occurred is presented, the term "discrimination" means the same thing: the employer has restricted § 7-protected activity while permitting similar conduct by others. *See* Estlund, supra, at 350 (differences between solicitation by employees and by outsiders "call for different results in particular cases, not the application of different principles.")

under § 7 have been interfered with or restrained does not necessarily depend on whether other unprotected activity was also treated unfavorably, or whether the employer intended the interference to occur. *See Register-Guard*, 351 NLRB at 1129 (2007) (dissenting opinion) ("Motive is not part of the analysis [in § 8(a)(1) cases].") Thus, that a policy barring noncharitable solicitation excludes Avon sales in addition to union solicitation does not eliminate the § 8(a)(1) problem. Avon is not protected by any federal statute; union activity is. *Id.* at 1130. Likewise, an employer that decides to bar all non-charitable solicitations without giving a thought to the effect that such a policy will have on union activity interferes with § 7 just as much as does an employer that chooses the same policy out of a specific desire to prevent § 7 activity.[5]

Implicit, but not always sufficiently explicit, in the Board's decisions in § 8(a)(1) nonemployee access cases is that "discrimination" occurs when an employer bars protected activity but permits other solicitation or distribution based on the *content* of the speech or the *identity* of the speaker, rather than simply based on the *conduct* at issue. "Conduct" means actions, not the substance of the message. Thus, if some outside groups are allowed to solicit or distribute literature or to sell their wares to customers or employees on employer property, nonemployee union representatives seeking to engage in protected activity must also be allowed

[5] While proof of discriminatory motive is not necessary for a § 8(a)(1) violation, it is worth noting that many employers that adopt "neutral" rules that exclude union organizers *are* likely acting out of a desire to impede union organizing or other § 7-protected activity. The adoption of just such "neutral" rules is precisely what "union avoidance" law firms and consultants advise employers to do if they want to prevent union activity. *See, e.g.,* John W. Polley, Charitable Fundraising *Could* Imperil Your Company's Union-Free Status (Oct. 19, 2001), http://www.faegre.com/3649 (advising employers how to adopt "content-neutral rules" regarding solicitation to remain "union free."). The difficulty or impossibility of distinguishing between cases in which the employer is motivated by a desire to discriminate against unions and those in which it is not provides additional support for the conclusion that no "discriminatory motivation" requirement should be imported into the § 8(a)(1) analysis.

to engage in similar conduct. *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583 (D.C. Cir. 1996); *Sandusky Mall Co.*, 329 NLRB 618 (1999), *enf. denied*, 242 F.3d 682 (6th Cir. 2001). As the Board and the D.C. Circuit have both put it, "an employer engages in discrimination as defined by section 8(a)(1) if it denies union access to its premises while allowing *similar distribution or solicitation* by nonemployee entities other than the union." *Lucile Salter Packard Children's Hospital*, 97 F.3d at 587 (quoting *D'Alessandro's, Inc.*, 292 NLRB 81, 83-84 (1988)). In practice, this means that an employer cannot "prohibit the dissemination of messages protected by the Act on its private property while at the same time allowing substantial civic, charitable, and promotional activities," *Sandusky Mall Co.*, 329 NLRB at 622.

While the exception to the discrimination rule for "isolated instances of charitable solicitation" did not apply in *Roundy's* or *Sandusky Mall*, in the interest of completeness we note that that exception is both unjustified and unworkable, and that in restating the appropriate test for discrimination in violation of § 8(a)(1), the Board should overrule it. The rule is unjustified for the reasons persuasively stated by Member Jenkins in his dissent in *Hammary Mfg. Corp.*, 265 NLRB 57 (1982). It is unworkable in that it needlessly complicates the discrimination analysis and invites post hoc rationalizations for unlawful conduct. There may have been numerous solicitations, but witnesses may not remember them all. Also, the vague "rule" leaves employers without guidance as to how much solicitation they can permit while staying within the bounds of the exception. *See Albertson's Inc.*, 332 N.L.R.B. 1132, 1138 (2000) ("[T]he phrase is not a model of clarity, and employers will be uncertain as to the parameters of that fuzzy line.") (Member Hurtgen, dissenting); G.C. Memo 01-06, Fundraising Following Recent Tragedy (Sept.

28, 2001) (acknowledging that the Board has not "defined the exact number of [allegedly isolated charitable] incidents necessary to find unlawful discrimination.")

The D.C. Circuit's decision in *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583 (1996) illuminates why an employer cannot, consistent with § 8(a)(1), permit some outside solicitation but exclude nonemployee union activity on the basis of its content or the identity of the speaker, even if the employer's policy is formally "neutral" with respect to § 7. In that case, a hospital had an official blanket no-solicitation policy, but the policy was not enforced. Instead, the hospital permitted numerous "nonemployee representatives of certain outside groups," including a credit union, a private insurance company, a family and child referral service, a seller of medical textbooks, and flower, jewelry, and clothing vendors, to set up tables from which to solicit and distribute literature to hospital employees. *Id.* at 586. However, the hospital would not permit a nonemployee union representative to set up a table in the same area to distribute literature to employees.

The hospital justified its exclusion of the union organizer on the ground that each of the solicitations it permitted constituted an "employee benefit." *Id.* at 590. But the court found that the Board drew a reasonable distinction between solicitations regarding benefits paid for in whole or in part by the employer, and solicitations involving products and services purchased out of the employees' own pockets. *Id.* at 590.

Once the hospital had opened its doors to the latter category of solicitation, the court agreed that the hospital violated the Act when it barred a nonemployee union organizer, whose activities were affirmatively protected by § 7, from engaging in similar activities. Accepting the hospital's argument would "mean that the Hospital could deem any nonemployee solicitations it wished as a 'benefit' for its employees, while still excluding Union solicitations." *Id.* at 590.

While the hospital did not see union membership as a "benefit" to its employees, employees themselves might well view it as a benefit. *Id.* at 590 n.10. In fact, the NLRA itself is premised on the idea that unionization may benefit both employees and the economy more generally. *See* NLRA § 1, 29 U.S.C. § 151. The hospital's related argument that union literature would be "inherently disturbing and disruptive" likewise could not justify the exclusion because that assertion was a "value judgment pure and simple, counteracted by the Union's perception that its effect might be quite the opposite." *Lucile Salter Packard,* 97 F.3d at 592.

B. Circuit Court Decisions Narrowly Defining "Discrimination" Permit Rampant Employer Interference with Section 7 Activity

In contrast to the D.C. Circuit's approach in *Lucile Salter Packard*, many courts reviewing the Board's decisions in this area have come up with definitions of "discrimination" under § 8(a)(1) that permit rampant employer interference with § 7-protected activity. Borrowing from statutes like Title VII, *see Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995), these courts have reasoned that "discrimination" under § 8(a)(1) occurs only where the employer explicitly draws lines according to whether the solicitation in question is union-related. Thus, the courts have concluded that it is permissible for employers to bar solicitation by unions and their members while permitting solicitation by others as long as those lines are drawn according to some allegedly "neutral" principle, such as a distinction between "personal" and "organizational" bulletin board notices, *Fleming Companies v. NLRB*, 349 F.3d 968, 975 (7th Cir. 2003); charitable vs. non-charitable solicitation, *Riesbeck Food Markets v. NLRB*, 1996 U.S. App. LEXIS 17693 (4th Cir. 1996); *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997); and even solicitation that the property owner subjectively decides is good for business vs. solicitation it deems bad for business. *Riesbeck; Salmon Run Shopping Ctr. v. NLRB*, 534 F.3d 108 (2d Cir. 2008). *See also Register-Guard*, 351 NLRB 1100 (2007)

(endorsing the idea that these types of distinctions are permissible because they are drawn "on a non-Section 7 basis.") Even under a cramped view of the meaning of "discrimination" under the NLRA, this reasoning is flawed because it would allow employers to permit "almost anything but union communications, so long as the employer does not expressly say so." *Register-Guard* at 1130 (dissenting opinion).

In none of these cases have the courts acknowledged that § 7-protected activity enjoys a *privileged* status under the NLRA. Indeed, in *Riesbeck* the court recognized that an employer's selective antisolicitation policy "chills trespassory union activity," but held that the policy nonetheless did not violate § 8(a)(1) because it "does not do so in a discriminatory manner, which is the relevant inquiry under the *Babcock & Wilcox* discrimination exception." *Id.* at *16. In actuality, the "relevant inquiry" under § 8(a)(1) is whether the employer "interfere[s]" with or "restrain[s]" § 7-protected activity and has no defense to such conduct on the basis of its property rights or managerial interests.

Several of these courts have gone even further and endorsed the idea that it is perfectly permissible for employers to explicitly *disfavor* § 7 solicitation as compared to other types of solicitation (often typified by the Girl Scouts) that the employer regards as more "innocent." *6 West Limited Corp. v. NLRB*, 237 F.3d 767, 780 (7th Cir. 2001). In one oft-repeated remark, the Sixth Circuit summarized this view:

> To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so … No relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution of union literature when access to the target audience is otherwise available.

Cleveland Real Estate Partners v. NLRB, 95 F.3d 457, 465 (6th Cir. 1996); quoted in *Be-Lo Stores*, 126 F.3d at 285; *Meijer, Inc. v. NLRB*, 463 F.3d 534, 546 (6th Cir. 2006); *Albertson's,*

Inc. v. NLRB, 301 F.3d 441, 451 (6th Cir. 2002); *Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 686 (6th Cir. 2001); *Sandusky Mall Co.*, 329 NLRB 618, 628 n.33 (1999) (Member Brame, dissenting).

These statements highlight the courts' failure to grapple with basic NLRA principles when interpreting the *Babcock* nondiscrimination rule. Contrary to the Sixth Circuit's assertion, employers do not have any general "right to exclude nonemployee distribution of union literature." *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 211 n.21 (1994). Moreover, "relevant labor policies" – specifically, the rights guaranteed by § 7 – *are* advanced by ensuring that nonemployee union representatives are not treated less favorably than other outsiders seeking access to the employer's property for similar conduct. By contrast, it is certainly true that "no relevant labor policies are advanced" by allowing employers to prohibit distribution of union literature where the employer allows charitable solicitations to take place on its property.

The reasoning that employers can prefer organizations like the Girl Scouts over union solicitation because the Girl Scouts are more "innocent" highlights exactly the chilling message that employees will understand if nonemployee union solicitors are excluded when other nonemployees engaged in similar conduct are let in. In such cases, unions have been forced to hold organizational meetings on the street while other groups were permitted use of an employer-owned meeting hall, *NLRB v. Stowe Spinning*, 165 F.2d 609, 611 (4th Cir. 1947), and to handbill next to driveways leading to the retail employer's property while non-union groups were permitted to solicit on the employer's premises at the entrances where customers walk into the stores. *Riesbeck Food Markets, Inc. v. NLRB*, 1996 U.S. App. LEXIS 17693 (4th Cir. 1996). At times, nonemployee union representatives have been asked to leave or removed by police, *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996), *Albertsons Inc. v.*

National Labor Relations Board, 301 F.3d 441, 444 (6th Cir. 2002), or even arrested, *Sandusky Mall*, 329 N.L.R.B. 618, 619 (1999), while solicitations and distribution by non-union outside groups have gone on uninterrupted. The clear message to employees is that the Girl Scouts or trinket vendors permitted to solicit on employer property are acceptable members of the civic community whose activities are wholesome and beyond reproach, while union representatives are dangerous outside agitators whose activities are illegitimate and perhaps illegal. Such a chilling message cannot be squared with the statutory protection granted to § 7 activities by the Act. *Cf. Mid-Mountain Foods, Inc. v. NLRB*, 269 F.3d 1075, 1076-77 (D.C. Cir. 2001) ("When the employee break area is filled with literature of all sorts, an employer's selective removal of pro-union pamphlets conveys the unmistakable message of hostility toward unionization.")

In addition to coming up with the objectionable "Girl Scouts" language, the Sixth Circuit in *Cleveland Real Estate Partners* invented out of whole cloth an extraordinarily narrow definition of "discrimination" that is not even consistent with Title VII principles. The court contrived a standard under which § 8(a)(1) discrimination means "favoring one union over another, or allowing employer-related information while barring similar union-related information." *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996); *accord Sandusky Mall Co. v. NLRB*, 242 F.3d 682 (6th Cir. 2001); *Albertson's, Inc. v. NLRB*, 301 F.3d 441, 451 (6th Cir. 2002). The Second Circuit has adopted a similarly indefensible and narrow standard under which "[t]o amount to Babcock-type discrimination, the private property owner must treat a nonemployee who seeks to communicate on a subject protected by section 7 less favorably than another person communicating *on the same subject*." *Salmon Run Shopping Ctr. v. NLRB*, 534 F.3d 108, 116-17 (2d Cir. 2008) (emphasis added).

There are additional analytical problems with the Sixth and Second Circuit standards. Both of these standards would, quite literally, permit employers to bar union solicitation exactly *because* it implicated employees' § 7 rights, as long as *all* § 7-related solicitation was barred. The Title VII equivalent would be permitting an employer to refuse to hire African-Americans as long as it did not discriminate *between* African-Americans on the basis of skin tone. Such a result does not make sense under any definition of "discrimination." Finally, the narrow definition of "discrimination" adopted by the Second and Sixth Circuits is directly contrary to the Supreme Court's holding in *Stowe Spinning* that formed the basis for the *Babcock* discrimination rule. In *Stowe Spinning*, the circuit court had reasoned that discrimination in violation of the Act could only occur where "one labor organization … is favored over another." *NLRB v. Stowe Spinning Co.*, 165 F.2d 609, 611 (4th Cir. 1947). Justice Jackson would have affirmed the Fourth Circuit; he wrote in dissent that discrimination "could hardly occur unless some other union had been allowed to use the hall." 336 U.S. at 235. But the Supreme Court disagreed, and found that discrimination in violation of § 8(a)(1) did occur even though the union was not treated differently than another union or another group speaking on § 7 issues, but rather was treated differently than various community and charitable organizations. 336 U.S. at 228-229.

C. Member Brame's Dissenting Opinion in *Sandusky Mall* Would Eviscerate Protection Against Discriminatory Exclusion of § 7 Activity

Dissenting in *Sandusky Mall*, 329 NLRB 618 (1999), Member Brame claimed that the Board's enforcement of § 8(a)(1) has been flawed because its "decisional standards" have been vague and because the Board has failed to properly apply the discrimination principles articulated by the Courts of Appeals in the decisions denying enforcement of the Board's orders in the cases discussed above. As a solution to these perceived failings and errors, Member Brame offered what he believed was the appropriate standard to be applied in § 8(a)(1) cases

involving nonemployee access. Although it may well be that a clearer articulation of the Board's rationale for its approach to § 8(a)(1) discrimination is needed in order to provide guidance to the Courts of Appeal and to employers, employees, and unions, the approach suggested by Member Brame's dissent would turn appropriate § 8(a)(1) analysis on its head.

Member Brame's dissent focused on the problem that employers will not know what types of solicitation policies they are permitted to adopt if the Board is not clear in articulating the "what types of conduct would be considered comparable" for the purposes of § 8(a)(1) analysis.[6] *Id.* at 626. However, in attempting to formulate such a rule, Member Brame began with the incorrect assertion that after *Lechmere*, discrimination is necessarily a "very narrow" exception to the general rule that nonemployee union representatives do not have a right to engage in solicitation on an employer's property. *Id.* at 626 n.22. As is noted above, *Lechmere* did not address the discrimination rule. Member Brame further erred by drawing from First Amendment case law, under which property owners are permitted to exclude speakers from their property based on whether the property owners believe that the speech will be good for their business or not. *Id.* at 627 (citing *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)). This analysis is

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[6] Member Brame's concern for *employers'* ability to know what rules they are playing by highlights the fact that in *Sandusky Mall*, the employees and union representatives had even *less* of an idea of the rules of the game. In that case, the employer did not follow its stated no-solicitation policy. 329 NLRB at 619. Rather, "both before and after the union handbilling, [the employer] allowed charitable, civic, and other organizations to solicit within the mall concourse." *Id.* The employer justified its exclusion of nonemployee union representatives based on a post-hoc explanation.

To permit the employer to exclude and cause the arrest of nonemployee union representatives in this situation based on an unwritten rule concocted after the fact, as Member Brame would have done, *id.* at 628, would permit the employer to blatantly discriminate against the union. *Cf. Register-Guard v. NLRB*, 571 F.3d 53, 60 (D.C. Cir. 2009) ("Whatever the propriety of drawing a line barring access based on organizational status, the problem with relying on that rationale here is that it is a post hoc invention.") Viewed from the point of view of employees and union representatives, such post-hoc invention of the rules leaves them with no way of knowing whether union activism is permitted or will get them fired or arrested. Chilling of § 7 activity is practically guaranteed.

just as faulty as those of courts that have injected Title VII principles into § 8(a)(1) cases, in that it ignores the affirmative protection granted by § 7 of the Act. If not for the NLRA, the employer could even ban all union speech by its own employees; the question is how to accommodate the rights that are granted by the Act against the employer's property interests.

It is not surprising, then, that the § 8(a)(1) discrimination test Member Brame formulated was precisely the inverse of the appropriate test. Member Brame posited that discrimination occurs only where an employer bars union solicitation while permitting solicitation by others who are "comparable" to the union *both* in terms of the "nature of the persons or organizations being excluded," i.e., the identity of the speaker, *and* "the nature of the activities which the property owner would prohibit," i.e., the content of the message. *Id.* Further, Member Brame would allow employers to make "exceptions" to policies generally permitting outside solicitation in order to bar "solicitations which undermine the very health or maintenance of its business," i.e., content offensive to the employer. *Id.* As applied, this test would mean that an employer could permit any and all outside solicitation while barring similar conduct that is protected by § 7 on the ground that the union's message did not "promote the operation of [its business]" and was "not likely to be beneficial to that business." *Id.* at 628. Of course, employers may well view the content of *any* § 7 speech as not beneficial to their business. Thus, Member Brame's proposed rule would effectively eviscerate the § 8(a)(1) discrimination rule.

CONCLUSION

For the reasons set forth above, the Board should take the opportunity to explain more fully the contours of and the reasons for the discrimination rule articulated in *Sandusky Mall*. The Board should clarify that an employer violates § 8(a)(1) when it bars § 7-protected solicitation or distribution by nonemployee union representatives, while permitting similar

conduct by other outsiders, under policies that draw lines based on the identity of the speaker or the content of the speech. The Board should also overrule *Hammary Mfg. Corp.* to the extent it held "an employer does not violate § 8(a)(1) by permitting a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule." The dissenting opinion in *Register-Guard* should inform the Board's discussion both in this case and in any future reconsideration of *Register-Guard* itself.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2011, I caused a true and accurate copy of the foregoing **Brief of Service Employees International Union as *Amicus Curiae*** to be sent via electronic mail to the following:

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